



U.S. Department of Justice

DOJ # 90-11-3-215

Washington, D.C. 20530

January 6, 1997

VIA FEDERAL EXPRESS

Mr. Jeffrey Apperson, Clerk
United States District Court
Western District of Kentucky
501 West Broadway, Room 231
Louisville, KY 40202

Re: United States v. Hardy, et al, No. C90-0695-L(J)

Dear Mr. Apperson:

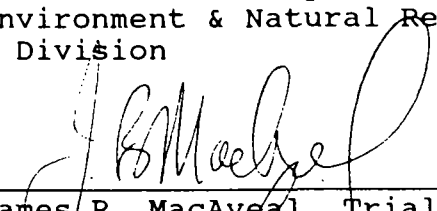
Enclosed for filing is the original and several copies of a consent decree resolving certain claims of the United States against the remaining defendants in the above matter. Please file the original and any required copies and return the remaining file-stamped copies to me in the enclosed self-addressed envelope.

Thank you for your assistance.

Sincerely,

Assistant Attorney General
Environment & Natural Resources
Division

By:


James R. MacAyeal, Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 616-8777

cc: counsel of record



10875967

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Civil Action Nos. 90-0695-L(J)
) 90-0792-L(J)
BEN HARDY, et al.,)
)
 Defendants.)

)

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint in United States District Court for the Western District of Kentucky on October 18, 1990, pursuant to Sections 107 and 113(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9607 and 9613(g), for declaratory relief and reimbursement of costs incurred and to be incurred by the United States in response to releases and threatened releases of hazardous substances into the environment from the Lee's Lane Landfill Superfund Site located approximately 4.4 miles southwest of Louisville, Kentucky, adjacent to the eastern bank of the Ohio River (the "Site");

WHEREAS, the United States has incurred costs in performing response actions at the Site, not including certain attorney's fees and prejudgment interest, of \$4,278,992.38 and the interest on the outstanding balance of \$1,476,871.69, for a total of \$5,755,864.07, as of April 1996, and has incurred and will have incurred additional costs, including but not limited to

attorney's fees and ~~prejudgment~~ interest, up to the date of entry of this Consent Decree;

WHEREAS, the United States has already entered into settlements with other parties in connection with the Site and pursuant to the settlements, embodied in two consent decrees, the other parties have reimbursed the United States a total of \$3,101,230.00 of costs incurred by the United States;

WHEREAS, the United States has sought to recover costs of at least \$2,654,634.07 from the remaining nonsettling defendants: Ben B. Hardy, J H Realty, Inc. and The Hofgesang Foundation, Inc. ("Foundation") (hereinafter collectively "Defendants") and obtain a declaratory judgment as to future costs;

WHEREAS, the United States and Defendants agree that settlement of this matter will avoid prolonged and complicated litigation, and this Court, by entering this Consent Decree, ~~finds that this Consent Decree, without being an admission of~~ liability, is fair, reasonable, and in the public interest;

THEREFORE, with the consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I.

JURISDICTION

A. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over Defendants. Solely for the purposes of this Consent Decree, Defendants waive all objections and defenses that they may have

to jurisdiction of the Court or to venue in this District and shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

II.

REPRESENTATIONS AND WARRANTIES

B. Defendants represent and warrant to the best of their knowledge and belief as follows:

1. The Foundation has assets and property interests as follows:

a. Real estate at 3000 Crittenden Drive, Louisville, Kentucky, which was appraised at \$585,000 on April 13, 1993, and which has an outstanding mortgage of \$85,767.50 as of June 6, 1996;

b. An account receivable in the form of a note from Terry Evans in the original amount of \$285,000 payable in sixty (60) monthly installments (with monthly payments of \$3,000.00 each and a balloon payment of \$208,037.81 due at the end of sixty (60) months);

c. An account receivable in the form of a note dated October 9, 1992 from Kenneth Shauntee in the original amount of \$7,000.00, payable in forty (40) monthly installments, secured by a single family residence located at 2206 Greenwood Avenue, Louisville, Kentucky, value unknown.

d. Real estate located at 1903 E. Main Street, New Albany, Indiana, value unknown, concerning which the Foundation has appealed a summary judgment entered by a trial

court in Indiana finding that the Foundation has lost title by adverse possession;

e. One-half interest in the title to real estate in Floyd County, Indiana at the corner of Grant Line Road and Mt. Tabor Road, value unknown, and a mortgage against the remaining one-half interest in title (which mortgage is currently in default), both of which interests are currently in the Hofgesang Estate and are the subject of litigation in Indiana state court;

f. A checking account with National City Bank, Louisville, Kentucky, with a balance of \$330.62 as of June 30, 1996;

g. Numerous undeveloped lots near the Lee's Lane Landfill in an area named Riverside Gardens, value unknown;

h. Preferred stock in Murphy Elevator Company with a face value of \$500.00;

i. ~~Real estate at 2001 S. 41st Street, 2003 S. 41st Street, 2000 S. 40th Street, and 1820 S. 40th Street,~~ Louisville, Kentucky, which are currently subject to tax liens that exceed the values of the properties and a Jefferson Circuit Court judgment for foreclosure and order of sale;

j. The Central and Northern Tracts of the Lee's Lane Landfill.

k. The stock of J H Realty, Inc.

2. J H Realty, Inc. has as its only asset the Southern Tract of the Lee's Lane Landfill.

3. Ben-B. Hardy ("Mr. Hardy") has certain assets and liabilities, all of which are described and set forth in his answers to interrogatories on file with the Court.

C. Defendants have made no fraudulent conveyances or transfers since 1987.

D. Defendants have made full and complete disclosure of all documents and information relating to each Defendant's assets and liabilities as requested by the United States.

III.

JUDGMENT

E. Judgment shall be entered jointly and severally in the amount of \$2,654,634.07 against J H Realty, Inc. and the Foundation. This judgment represents all response costs, including but not limited to, direct and indirect costs relating to the Site incurred by EPA and the U.S. Department of Justice on behalf of EPA through the date the Consent Decree is entered by the Court, plus interest on all such costs ("Past Response Cost"). This judgment shall be set forth in a separate document as required by Rule 58 of the Federal Rules of Civil Procedure.

IV.

COVENANT NOT TO SUE

F. The United States covenants not to sue Mr. Hardy under Section 107 of the CERCLA, 42 U.S.C. §§ 9607, to recover Past Response Costs. If at any time, the United States proves to the Court by a preponderance of the evidence that Mr. Hardy knowingly has made any material misrepresentation or omission regarding his

financial status~~as set forth~~ in his answers to interrogatories on file with the Court or with respect to representations made herein, this covenant not to sue shall be null and void and Mr. Hardy will not object to entry of judgment against him for the value of any undisclosed assets. Nothing in this Consent Decree shall be interpreted to limit the right of the United States to seek information relating to Mr. Hardy's financial status under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and the United States retains such right after entry of this Consent Decree. Mr. Hardy waives the statute of limitations relating to the United States' CERCLA claims set forth in the pending Complaint.

G. The covenant not to sue set forth in the preceding paragraph does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against ~~Defendants with respect to all other matters.~~ Except as provided in this Consent Decree, nothing shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9607, or any other provision of law, against Defendants or against any other person or entity not a party to this Consent Decree. The covenant not to sue set forth herein does not apply, inter alia, to the following:

- (1) claims based upon failure of Defendants to meet the requirements of this Consent Decree;

- (2) ~~claims for damages~~ to natural resources, as defined in Section 101(6) of CERCLA, 42 U.S.C. § 9601(6);
- (3) claims for costs incurred by any natural resources trustees;
- (4) claims based upon criminal liability;
- (5) claims for injunctive relief or administrative order enforcement under Section 106 of CERCLA; and
- (6) claims for costs incurred or to be incurred by the United States in connection with the Site after entry of this Consent Decree.

V.

SATISFACTION OF THE JUDGMENT

H. In full and complete satisfaction of the judgment entered against J H Realty, Inc. and the Foundation, the Foundation shall pay to the United States a percentage, as set forth below, of the net liquidated value of the assets of the Foundation listed above at II(B)(1)(a) through (h) of this Consent Decree ("Settlement Assets"). The Foundation shall pay the United States ninety (90) percent of the Net Liquidated Settlement Assets. Net Liquidated Settlement Assets means any cash amount which is remaining after deduction of costs incurred in preserving and liquidating the Settlement Assets. Immediately upon the liquidation of any particular Settlement Asset, the Net Liquidated Settlement Asset from that Settlement Asset shall be deposited into an interest bearing account with a financial

institution selected by Defendants and approved by the United States, and payment to the United States shall be made in accordance with instructions provided by the United States to the Defendants. Unless otherwise instructed, however, payment shall be made by certified check or checks or cashier's check or checks made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number (04-43), USAO File Number (90V0890) and DOJ Case Number (90-11-3-215). The check shall be sent to the Financial Litigation Unit of U.S. Attorney's Office for the Western District of Kentucky at the address set forth below in Section X. Defendants shall send notice that such payment has been made to EPA and DOJ in accordance with Section X (Notices and Submissions).

I. The Foundation may use its ten (10) percent of any Net Liquidated Settlement Asset for any purpose. The Foundation may pay professional fees, however, only after it has liquidated the real estate at 3000 Crittenden Drive, Louisville, Kentucky, as described in II(B)(1)(a), and the account receivable in the form of a note, as described in II(B)(1)(b), unless the Foundation has satisfied the United States that adequate provisions have been made with respect to legal representation in connection with the litigation involving the Foundation in connection with the asset set forth in II(B)(1)(d), as reflected by a written document filed with the Court noting that the United States is satisfied that adequate representation has been provided. If the United

States disputes whether adequate provisions have been made with respect to such legal representation, the dispute shall be resolved by the Court as provided in Section XIV below.

VI.

DISCOVERY AND DISCLOSURE OF FINANCIAL ASSETS

J. If at any time the Court determines that the Foundation made any material misrepresentation or nondisclosure regarding the financial status and affairs of the Foundation to the United States in connection with this Consent Decree, the satisfaction of judgment provided for in Section V herein shall be null and void. Nothing in this Consent Decree shall be interpreted to limit the right of the United States to seek information relating to the Foundation's assets and finances under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and the United States retains such right after entry of this Consent Decree.

VII.

CONTRIBUTION PROTECTION/EFFECT OF SETTLEMENT

K. With regard to claims for contribution against Defendants for matters addressed in this Consent Decree, the parties agree, and by entering this Consent Decree this Court finds, that upon entry of this Consent Decree and conditioned upon the subsequent payments and other consideration by the Defendants as required by this Consent Decree, Defendants are entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for

matters addressed~~in this Consent Decree~~. The matters addressed in this Consent Decree are Past Response Costs, as defined above.

L. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

VIII.

LIQUIDATION PROCESS

M. Unless and until the United States appoints a receiver or other third party to liquidate the Settlement Assets, the Foundation and Mr. Hardy shall use best efforts to liquidate the ~~Settlement Assets of the Foundation according to the attached~~ schedule. The Foundation shall be compensated out of liquidation proceeds for the reasonable and necessary costs and expenses of such liquidation, including brokerage fees and closing costs. All other liquidation costs and expenses that have been preapproved in writing by the United States shall be reimbursable from the liquidation proceeds. If any such costs and expenses have not been preapproved by the United States, and the United States disputes the reasonableness or necessity of the costs or expenses, the dispute shall be resolved by the Court as provided in Section XIV below.

— N. At any time after entry of this Consent Decree, the United States in its sole discretion may appoint a receiver or other third party to liquidate any of the assets of the Foundation. The Foundation shall cooperate with the receiver or third party in the liquidation, including but not limited to, providing necessary signatures, information, or documents relating to the Settlement Assets or the liquidation thereof. The Foundation shall grant the receiver or third party a general power of attorney to perform the liquidation on behalf of the Foundation during the period of liquidation. The receiver or third party shall not assume any responsibility for managing or operating the Site. If the United States conducts the liquidation, the United States will retain ninety (90) percent of the Net Liquidated Settlement Assets of the Foundation and will pay the Foundation ten (10) percent of the Net Liquidated Settlement Assets, unless the Court determines that Defendants have not used best efforts to liquidate the Settlement Assets of the Foundation or the Foundation has any undisclosed assets, in which case the United States will retain one hundred (100) percent of whatever assets of the Foundation the United States liquidates. In no event, however, shall the costs of liquidation be treated as costs of response under CERCLA with respect to Defendants. If the United States conducts the liquidation, the United States need not liquidate all assets of the Foundation, and shall have a reasonable time to complete the liquidation at its sole discretion. During the time of the liquidation, the

receiver or other-third-party-shall have the authority to preserve the assets of the Foundation, including, but not limited to, paying management fees, legal fees, mortgage payments, utility bills and taxes. Upon the liquidation of any particular Settlement Asset, the Net Liquidated Settlement Asset from that Settlement Asset shall be deposited into an interest bearing account with a financial institution selected by the United States, and any payment to the Foundation of its ten (10) percent interest shall be made in accordance with instructions provided to the United States by the Foundation, unless the Court determines that such payments should be delayed in order to determine whether they are due at all as provided for herein.

O. Unless and until the receiver or third party is appointed, the Foundation shall not knowingly take any action, and shall not knowingly refuse to take any such action, that ~~adversely affects the value of the Foundation's Settlement~~ Assets, including but not limited to failing to pay taxes or utility bills, encumbering any real estate, or allowing any appeal rights to lapse in pending litigation. The Foundation may use Foundation funds and assets, including any income from rents, to preserve the Settlement Assets of the Foundation unless and until the receiver or third party is appointed, including payment of mortgages, utility bills and taxes; provided, however, that any other such payments, including any necessary and reasonable attorney's fees to protect any rights relating to any Settlement Asset which is or becomes the subject of litigation, must be

preapproved by the United States with such approval reflected in a written document filed with the Court. Any disputes relating such matters shall be resolved by the Court as provided in Section XIV below.

IX.

COVENANT NOT TO SUE BY SETTLING DEFENDANTS

P. Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees, with respect to Past Response Costs, including but not limited to any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law; any claim arising out of response actions at the Site for which the Past Response Costs were incurred; and any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X.

NOTICES AND SUBMISSIONS

Q. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the

individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and Defendants, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

As to EPA:

Robert Caplan
Assistant Regional Counsel
Environmental Protection Agency, Region 4
345 Courtland Street
Atlanta, Georgia 30365

As to the Financial Litigation Unit
of U.S. Attorney's Office for the Western
District of Kentucky:

Financial Litigation Unit of U.S. Attorney's
Office for the Western District of Kentucky
Bank of Louisville Building
510 West Broadway
Louisville, Kentucky 40202

As to Defendants:

Mark R. Feather
Brown, Todd & Heyburn PLLC
3200 Providian Center
Louisville, Kentucky 40202-3363

Ben B. Hardy
209 S. Fifth Street
Louisville, Kentucky 40202

XI.

COSTS AND ATTORNEY'S FEES

R. Except as provided herein, each party shall bear its own costs and attorney's fees.

XII.

EFFECTIVE DATE

S. The effective date of this Consent Decree shall be the date upon which it is entered by the Court. The United States and Defendants are bound by the terms and conditions of this Consent Decree upon the signature of all parties to this Consent Decree. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the parties.

XIII.

MODIFICATION

T. Except as provided for herein, there shall be no modification of this Consent Decree without prior written approval of the parties to this Consent Decree and the Court.

XIV.

CONTINUING JURISDICTION OF THE COURT

U. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

— THIS CONSENT DECREE is entered on this ____ day of
_____, 1996. IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Hardy, et al., Nos. 90-0695-L(J) and 90-0792-L(J) relating to the Lee's Lane Landfill Superfund Site in Louisville, Kentucky.

FOR THE UNITED STATES OF AMERICA

11/3/86
DATE

Lois J. Schiffer
LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

DATE

James R. MacAyeal
JAMES R. MacAYEAL, Trial Attorney
JAMES D.P. FARRELL, Trial Attorney
Environmental Enforcement Section
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
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MICHAEL TROOP
United States Attorney
Western District of Kentucky

REGINA EDWARDS
Assistant United States Attorney
Bank of Louisville Building
510 West Broadway
Louisville, Kentucky 40202
(502) 582-5911

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Hardy, et al., Nos. 90-0695-L(J) and 90-0792-L(J) relating to the Lee's Lane Landfill Superfund Site in Louisville, Kentucky.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

12/26/96
DATE

John H. Hankinson, Jr.
JOHN H. HANKINSON, JR.
Regional Administrator
Region 4
U.S. Environmental Protection Agency
100 Alabama Street, S.W.
Atlanta, Georgia 30303

12-26-96
DATE

Robert W. Caplan
ROBERT W. CAPLAN
Associate Regional Counsel
Region 4
U.S. Environmental Protection Agency
100 Alabama Street, S.W.
Atlanta, Georgia 30303

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Hardy, et al., Nos. 90-0695-L(J) and 90-0792-L(J) relating to the Lee's Lane Landfill Superfund Site in Louisville, Kentucky.

THE HOFGESANG FOUNDATION, INC.

By:

Name:

Title:

Date:

Ben B. Hardy

President

06/27/96

J H REALTY, INC.

By:

Name:

Title:

Date:

Ben B. Hardy

President

06/27/96

BEN B. HARDY

By:

Date:

06/27/96

SCHEDULE FOR LIQUIDATION
OF SETTLEMENT ASSETS
OF THE HOFGESANG FOUNDATION

- A. Real Estate at 3000 Crittenden Drive, Louisville, KY

Because of an existing lease on the property, the Foundation will attempt to sell the property to the tenant within 60 days after entry of the Consent Decree. If no contract has been signed within that time period, the Foundation will list the property with a licensed broker.

- B. Account Receivable in the form of a Note from Terry Evans

The Foundation will sell the Note within 45 days after entry of the Consent Decree.

- C. Account Receivable in the form of a Note from Kenneth Shauntee

The Foundation will sell the Note within 45 days after entry of the Consent Decree.

- D. Real Estate at 1903 E. Main Street, New Albany, IN

The Foundation will continue to assert its claim to ownership of this property, and if successful, will list the property with a licensed broker within 60 days of the final determination concerning its ownership.

- E. One-half Interest in Real Estate in Floyd County, Indiana at the corner of Grant Line Rd. and Mt. Tabor Rd., and a mortgage against the remaining one-half interest in title

The Hofgesang Estate will continue to assert its claim to ownership of the property and its right to collect on its mortgage. Within 60 days after a final determination concerning its claims, the Hofgesang Estate will transfer any net interest to the Foundation. Within 60 days thereafter, the Foundation will list any property owned with a licensed broker or otherwise liquidate any ownership interest it has.

- F. Checking Account with National City Bank, Louisville, KY

Within 30 days after entry of the Consent Decree, the Foundation will transfer 90% of the amount in the checking account to the United States.

G.— Undeveloped Lots ~~of Riverside~~ Gardens near the Lee's Lane
Landfill

The Foundation will list these properties with a
licensed broker within 30 days after entry of the Consent
Decree.

H. Preferred Stock in Murphy Elevator Company

The Foundation will sell the stock within 60 days after
entry of the Consent Decree